

1 ANDRÉ BIROTTE JR.
United States Attorney
2 ROBERT E. DUGDALE
Assistant United States Attorney
3 Chief, Criminal Division
STEVEN R. WELK
4 Assistant United States Attorney
Chief, Asset Forfeiture Section
5 MONICA E. TAIT
Assistant United States Attorney
6 California Bar No. 157311
1400 United States Courthouse
7 312 North Spring Street
Los Angeles, California 90012
8 Telephone: (213)894-2931
Facsimile: (213)894-7177
9 E-Mail: Monica.Tait@usdoj.gov

10 Attorneys for Plaintiff
United States of America

11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 UNITED STATES OF AMERICA,) NO. CV 09-2398 RGK (RZx)
15)
Plaintiff,) GOVERNMENT'S SUPPLEMENTAL
16) MEMORANDUM REGARDING REVISED
v.) PROPOSED INTERIM DISTRIBUTION
17) ORDER PERMITTING USE OF UP TO
\$6,874,561.25 IN FUNDS FROM SIX) \$16,500 IN SEIZED FUNDS FOR
18 WELLS FARGO BANK ACCOUNTS, et) MAILING AND RELATED EXPENSES OF
al.,) DISTRIBUTION
19)
Defendants.) DATE: March 7, 2011
20) TIME: 9:00 a.m.
COURTROOM 850

21 The government hereby submits this Supplemental Memorandum
22 to accompany the contemporaneously filed REVISED PROPOSED ORDER:
23 INTERIM DISTRIBUTION PLAN FOR SEIZED LIQUID ASSETS AND PERMITTING
24

1 USE OF UP TO \$16,500 IN SEIZED FUNDS FOR INTERIM AND FINAL
2 DISTRIBUTION MAILING AND RELATED EXPENSES.

3 DATE: February 25, 2011 Respectfully submitted,

4 ANDRÉ BIROTTE JR.
5 Acting United States Attorney
6 ROBERT E. DUGDALE
7 Assistant United States Attorney
8 Chief, Criminal Division
9 STEVEN R. WELK
10 Assistant United States Attorney
11 Chief, Asset Forfeiture Section

12 /s/
13 _____
14 MONICA E. TAIT
15 Assistant United States Attorney

16
17 Attorneys for Plaintiff
18 United States of America
19
20
21
22
23
24
25
26
27
28

SUPPLEMENTAL MEMORANDUM

On February 2, 2011, the government filed a motion seeking this court's authority to conduct an interim distribution to 1,826 Best Diamond Funding investors of \$9.2 million of the approximately \$12,029,255.76 in seized liquid assets over which this Court has *in rem* jurisdiction (the "Interim Distribution Motion"). The government mailed notice of the Interim Distribution Motion and the proposed Order by mail to the more than 2,200 known investors on February 4, 2011 (See docket no. 87 (Proof of service)), and posted the text of the motion, its exhibits, and the proposed Order on the public website for the United States Attorney's Office at the same time. Any opposition was due February 18, 2011. As of February 25, 2011, no oppositions to the distribution plan have been filed.

As previously expressed to the Court, it was the intent of the undersigned United States Attorney's Office ("USAO") at the time it applied for appointment of a Special Master (December 2009) that the government would directly handle any distribution of seized funds to the investors. However, after the Interim Distribution Motion was filed in February 2011, the USAO was advised by the headquarters office of the U.S. Marshals Service ("USMS") and by representatives of the Asset Forfeiture and Money Laundering Section of the Department of Justice ("Main Justice") that the proposed payment and mailing of so many individual checks to the investors by the USMS as the USAO had proposed poses legal and operational impediments that strongly caution against ordering the USMS to perform the distribution as the USAO originally proposed.

1 To accommodate these concerns and avoid further delay, the
2 USAO proposes entry of a revised Interim Distribution Order. If
3 the Court grants the Interim Distribution Motion, the
4 accompanying revised proposed Order would (a) allow the USMS to
5 deliver the \$9.2 million to a third party to be contracted by the
6 government, for further payment to the investors; (b) have the
7 contractor pay the amounts ordered by this Court by check mailed
8 to each of the investors (and be responsible for tracking address
9 changes and re-mailing checks as necessary); and (c) allow
10 payment of the contractor's expenses up to \$16,500.00 to be paid
11 by USMS from the seized liquid assets.

12 **I. DEPARTMENT OF TREASURY REQUIREMENTS WILL IMPEDE OR PREVENT**
13 **DISTRIBUTION OF THE SEIZED ASSETS IF THE DISTRIBUTION**
IS HANDLED BY THE GOVERNMENT

14 While the USMS is the custodian of the defendant assets, the
15 release of seized liquid assets is now actually executed by the
16 Financial Management Service ("FMS"), a bureau of the Department
17 of Treasury. Two problems are posed by FMS's involvement in the
18 proposed distribution, addressed below.

19 **A. Treasury Offset Program**

20 As the government informed the court in the Interim
21 Distribution Motion, FMS ordinarily requires a Social Security
22 Number ("SSN") before making a payment from funds held by the
23 government. Motion, n.5. This requirement, codified at 31
24 U.S.C. § 3325(d), facilitates the execution of the Treasury
25 Offset Program ("TOP"), codified at 31 U.S.C. § 3716. The
26 purpose of TOP is to enable the government to determine whether
27 the proposed recipient of money from a federal agency already
28 owes a debt to the United States (and certain state agencies,

1 such as for child support payments) so that the federal payment
2 can be used to offset that debt. See [http://fms.treas.gov/debt/](http://fms.treas.gov/debt/top.html)
3 [top.html](http://fms.treas.gov/debt/top.html).

4 The USAO has been advised that representatives of Main
5 Justice and the USMS headquarters office believe that application
6 of the TOP would be mandatory in this case if the government were
7 to directly distribute the seized funds to the investors involved
8 in the proposed Interim Distribution. This view conflicts with
9 the Interim Distribution Order the USAO previously proposed on
10 February 2, 2011 (which effectively would have directed USMS to
11 ignore TOP). In this matter, the USAO possesses many, but not
12 all of the investors' SSNs. Given the extraordinary
13 circumstances of this case, the USAO does not believe it would be
14 in the interests of justice to delay the interim distribution in
15 order to either internally challenge the application of TOP to
16 the proposed distribution in this case, or to take steps to
17 obtain all the investors' SSNs in order to comply with TOP.

18 There is an alternative, however: if the USMS directs FMS
19 to pay the entire interim distribution amount to a contractor for
20 further distribution in accordance with any Order entered by the
21 Court, the contractor's tax identification number would be used
22 to identify the payment in accordance with 31 U.S.C. § 3325(d)
23 without running afoul of TOP. That is the solution proposed in
24 the accompanying revised Interim Distribution Order.

25 **B. Requirement of Electronic Payment**

26 A second problem with the Order previously proposed by the
27 USAO is the requirement that the investors be paid by check. FMS
28 is phasing out all non-tax payments by check made by federal

1 agencies, and has recently adopted regulations generally
2 prohibiting such payments after May 1, 2011. See 31 C.F.R. Part
3 208 (December 21, 2010). Although it is not clear whether the
4 new regulation directly prohibits the payment of checks as
5 proposed in the original Interim Distribution Order, FMS strongly
6 disapproves of returning seized funds by check, and is slow in
7 any event to make check payments. Moreover, if agency officials
8 determine that the original Interim Distribution Order does
9 conflict with the new electronic payment regulation, the USAO
10 would be required to return to the Court after the fact to
11 request a modification of the payment conditions, resulting in
12 delay. More critically, the USAO does not have current bank
13 account information for any of the investors, and therefore
14 cannot supply to FMS the information necessary to make electronic
15 transfers to each investor without contacting each investor for
16 such information, which will cause substantial delay (and dismay
17 on the part of the investors).

18 Whether FMS's objections are based on the new regulation or
19 are more logistical, resolving this issue is certain to delay the
20 proposed distribution. The revised proposed Order sidesteps the
21 issue: FMS can electronically transfer the funds to a
22 contractor, and the contractor will issue and mail the individual
23 checks to the investors.

24 **II. THE EXPENSES OF MAILING CHECKS SHOULD BE PAID FROM THE** 25 **RESTRAINED ASSETS**

26 The undersigned contacted a well-known firm that specializes
27 in distributing funds to large numbers of victims in class action
28 and other cases, and requested an estimate of the cost of

1 conducting the proposed Interim Distribution and a potential
2 final distribution, including the costs of mailing, dealing with
3 returned checks and investors' address changes, and reissuing/re-
4 mailing checks as necessary. The firm's representative estimated
5 the cost would be approximately \$15,000. Based on this estimate,
6 the revised proposed Order would permit the USMS to pay up to
7 110% of this amount (\$16,500) from the restrained liquid assets
8 to a qualified third party to be chosen by the USAO for the
9 purpose of issuing and mailing checks in accordance with any
10 distribution Orders this Court may issue.

11 In large investor fraud cases such as those brought by the
12 Securities and Exchange Commission ("SEC"), it is typical for the
13 expenses of court-appointed fund managers to be paid from the
14 funds taken from the wrongdoer under the Court's control. As the
15 government noted in its Motion, no claims of ownership to the
16 seized funds have been filed in Court by either the titleholders
17 or the victims to contest the forfeiture of the seized assets.
18 More than 1,800 of the investors are time-barred from filing
19 claims, most having instead accepted the "no litigation option."
20 This level of cooperation indicates that the investors as a group
21 accept the Court's administration of the seized funds, including
22 the use of the fund to pay certain expenses incident to
23 distributing the seized funds. Moreover, the taxpayers as a
24 whole should not be required to pay for the distribution expense
25 of a contractor. The government has shouldered (and will likely
26 continue to shoulder) substantial expenses and staff time in
27 connection with repeatedly mailing notifications and other
28 materials to the pool of more than 2,000 investors. See, e.g.,

1 Interim Distribution Motion, Exhibits 2-4 (a sampling of the
2 documents mailed to the investors).

3 Based on the Interim Distribution Plan prepared by the
4 Special Master (attached as Exhibit 5 to the government's
5 Motion), if the Court approves, each of the currently finalized
6 investors is slated to receive 32.65% of his or her Final Loss
7 Amount. The government does not propose changing this percentage
8 to account for additional \$16,500 expense now proposed. As
9 explained in detail in the motion, the Special Master has
10 proposed holding back a conservatively large amount of the seized
11 funds from the proposed Interim Distribution, believed to be
12 sufficient to account for paying the approximately 400 unresolved
13 investors' losses at the same pro-rata percentage pay the Special
14 Master's costs and expenses going forward. Motion, pp. 6-9.
15 Based on (a) the conservativeness of the Special Master's
16 calculation, (b) the fact that additional assets will be added to
17 the pool of distributable assets to distribute from a related
18 case¹, and (c) the likelihood that some of the investors will not
19 be found and their distributions will be returned to the pot, the
20 government expects that the payment to the contractor of up to
21 \$16,500.00 from the seized liquid assets will not alter the
22 distribution percentage for the remaining investors.

23 If the worst case scenario were to occur and there is a

24
25 ¹ As explained in n.9 to the Motion, by the time of the
26 final distribution, additional assets will likely be added to the
27 pot: first, the liquidated value of two vehicles that are
28 defendants in this case; and second, \$50,000 or more from assets
in a related civil forfeiture case (United States v. \$6,601.00 in
U.S. Currency, et al., CA 10-06831-RGK (AGRx)). These assets
will augment the amount of funds that can be used to pay the
contractor's expenses and the unresolved investors.

1 deficit requiring reducing the pro-rata distribution percentage,
2 the government will propose reducing the percentage distributed
3 to the small group of investors described as "Non-responder,
4 claim barred" in the chart on page 4 of the government's motion:
5 these investors received the government's notices and did not
6 timely respond in any fashion. Although they are time-barred
7 from filing court claims, the government has offered them one
8 final opportunity to participate in the distribution of assets
9 (assuming they have losses).

10 On a final note, the use of a contractor to mail the checks
11 will not interfere with the continuing work of the Special
12 Master. The order appointing the Special Master tasked him with
13 determining the victims' losses (a project the Special Master's
14 team must continue in light of the number of unresolved claims),
15 but not the task of distributing the funds.

16 **III. CONCLUSION**

17 For all the above reasons, the government respectfully
18 requests that the Court enter the revised proposed Interim
19 Distribution Plan for Seized Liquid Assets and Permitting Use of

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 up to \$16,500 in Seized Funds for Interim and Final Distribution
2 Mailing and Related Expenses.

3 DATE: February 25, 2011 Respectfully submitted,

4 ANDRÉ BIROTTE JR.
Acting United States Attorney
5 ROBERT E. DUGDALE
Assistant United States Attorney
6 Chief, Criminal Division
STEVEN R. WELK
7 Assistant United States Attorney
Chief, Asset Forfeiture Section

8 /s/
9 MONICA E. TAIT
Assistant United States Attorney

10 Attorneys for Plaintiff
11 United States of America
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28